IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GERALD JOSEPH VAN BUSKIRK, III, a Minor, by his Parents and Natural Guardians, GERALD J. VAN BUSKIRK, JR. and LORI ANN BUSKIRK and in Their Own Right, Plaintiffs,	CIVIL ACTION
v.	NO. 96-6945
THE WEST BEND COMPANY, Defendant.	

MEMORANDUM

R.F. KELLY, J. JULY 10, 1997

Plaintiffs (the "Van Buskirks") instituted this products liability action against the West Bend Company to recover for injuries sustained by their six-month old son, Gerald Van Buskirk III, in an accident that occurred on February 3, 1995. Plaintiffs claim that there are design defects present in West Bend's Four-Cup Deep Fryer and that those defects proximately caused Gerald's injuries. Presently before the Court is West Bend's Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the reasons that follow, West Bend's Motion will be granted.

I. BACKGROUND

West Bend is a manufacturing company that produces the Four-Cup Deep Fryer that is alleged to have caused Gerald's

injuries. Plaintiffs allegedly bought a West Bend Four-Cup Deep Fryer some time before Gerald's accident. On February 3, 1995, Mrs. Van Buskirk filled a deep fryer with oil and set it on top of a microwave oven in her kitchen. The microwave was resting on the top of a cart with wheels. Mrs. Van Buskirk then unplugged the Fryer's cord and placed it on the microwave so that no part of it would hang over the side of the cart. She then proceeded to leave the kitchen and, subsequently, saw Gerald enter the kitchen. Gerald was in a walker and was only able to walk backwards at the time. Next, Mrs. Van Buskirk heard Gerald scream and she immediately re-entered the kitchen to find Gerald covered with the hot oil that was in the Fryer. The oil caused severe and permanent burns to Gerald. Mrs. Van Buskirk can only speculate that the Fryer fell over because Gerald tugged on the cord.

After the accident, Mr. Van Buskirk's sister threw away the Fryer because it upset her. This was done without the consent or knowledge of the Plaintiffs. Plaintiffs do not know for a fact if they purchased the Fryer or acquired it some other way. They also do not know its age or where it was purchased. The only proof they offer to show that the product in question was a West Bend fryer is a spoon that supposedly accompanied the Fryer, a product brochure and a service-center list. However, the spoon was not custom designed for this specific West Bend Deep Fryer. In addition, the product brochure is not specific to a West Bend Deep Fryer of any particular year. Also, the

copyright on the brochure is dated 1988 indicating that the Deep Fryer allegedly used by Plaintiffs was made some time during or after 1988.

Despite the above, Plaintiffs have brought this products liability claim alleging faulty product design. Plaintiffs' Complaint alleges the following defects: (1) the subject Deep Fryer should have been equipped with a retractable cord; (2) the subject Deep Fryer should have been equipped to prevent it from falling off a flat surface; and (3) the Fryer should have been equipped with an interlocking lid to prevent hot oil from spilling from the unit.

II. STANDARD

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the initial burden of informing the court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). The non-moving party cannot rest on the pleadings, but rather that party must go beyond the pleadings and present "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). If the court, in viewing all reasonable inferences in favor of the non-moving party, determines that there is no genuine issue of material fact, then summary judgment is proper. Celotex, 477

U.S. at 322; Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 83 (3d Cir. 1987).

III. DISCUSSION

In Webb v. Zern, 220 A.2d 853, 854 (Pa. 1966), the Pennsylvania Supreme Court adopted § 402A of the Restatement (Second) of Torts as the law of strict products liability in Pennsylvania.[1] The Pennsylvania Supreme Court subsequently established that § 402A "imposes strict liability in tort not only for injuries caused by the defective manufacture of products, but also for injuries caused by defects in their design." Lewis v. Coffing Hoist Div., Duff-Norton Co., 528 A.2d 590, 592 (Pa. 1987).

In order to bring a products liability action in Pennsylvania, a plaintiff must demonstrate that: (1) the product was defective, (2) the defect existed while the product was in

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1. Section 402A of the Restatement (Second) of Torts (1965) provides that:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer . . . is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
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> (2) The Rule stated in subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

the control of the manufacturer; and (3) the defect was the proximate cause of the plaintiff's injuries. Walton v. Avco Corp., 610 A.2d 454, 458-59 (Pa. 1992).

A. Product Identification

Defendant argues that there is no way to determine that the appliance which fell over and burned Gerald was a West Bend product. They argue that the presence of the spoon, the brochure, and the service-center list merely proves that the Van Buskirks may have owned a deep fryer at one point before the accident. However, under Pennsylvania law, a plaintiff will carry their burden of proof with respect to product identification if they set forth sufficient evidence as to the identity of the manufacturer. O'Donnell v. Big Yank Inc., Pa. Super. Ct. No. 1399 Phila. 1996 (June 18, 1997).

In O'Donnell, the plaintiff was wearing clothing that was allegedly manufactured by the Defendant. The plaintiff maintained that his clothes caught on fire, quickly melted upon exposure to the flames and produced a hot, tarry substance which caused or substantially enhanced his burn injuries. Although the plaintiff later threw the incinerated clothes away, he submitted pants and other clothing that were purchased along with the alleged defective clothing. All of the clothing submitted by plaintiff was manufactured by the same company and sold at the same department store. The trial court disallowed introduction of evidence by the plaintiff regarding the pants because the defendant was unable to challenge whether it was the manufacturer

of the discarded clothing.[2] However, the Superior Court rejected the trial court's reasoning. Thus, the Plaintiff in O'Donnell was able to avoid summary judgment on the product identification issue by submitting evidence that the pants in question were manufactured by Defendant.

The case at bar is similar. Here, Plaintiffs have offered the spoon, brochure, and service-center list as evidence that the Fryer that caused Gerald's injuries was manufactured by West Bend. Such evidence, coupled with the deposition testimony of Mr. and Mrs. Van Buskirk which states that it was indeed a West Bend Deep Fryer that fell over and burned Gerald, is sufficient to create a genuine issue of material fact as to whether the Fryer used by the Plaintiffs was actually manufactured by West Bend. As a result, Defendant's Motion for Summary Judgment on the basis of Plaintiffs' failure to identify the product will be denied.

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2. The trial court based it's reasoning on the case DeWeese v. Anchor Hocking, 628 A.2d 421 (Pa. Super 1993), which held that, even in a design defect case, the product is necessary because plaintiff is unable to prove a prima facie case absent proof of the identity of the seller and/or manufacturer. In DeWeese the plaintiff was injured by a glass carafe that exploded after being filled with hot water. The broken glass was subsequently swept away and discarded. The court ruled that the plaintiff's failure to preserve the pitcher was fatal because there was "no evidence tending to establish that the pitcher involved was manufactured or sold by either defendant." Id. at 423. The O'Donnell case was distinguished from the DeWeese case because the plaintiff in O'Donnell was prepared to and able to submit evidence to establish that the defendant was the manufacturer of the clothing at issue.

B. Spoliation of Evidence

As discussed above, Gerald's Aunt threw away the Fryer after the accident occurred. West Bend asserts that they will never be able to inspect the product to determine if there was any pre-existing damage or, for that matter, impact damage that may have given some indication of how the accident happened. As a result, West Bend argues that they will be severely prejudiced defending this products liability action.

To support its argument, Defendant first cites Roselli v. General Elec. Co., 599 A.2d 685 (Pa. Super. 1991), where the court stated that "to permit claims of defective products where a purchaser of the product has simply thrown it away after an accident, would both encourage false claims and make legitimate defenses of valid claims more difficult." Id. at 687. However, the plaintiff in Roselli was alleging a manufacturing defect in the specific product that caused the injury. Here, Plaintiffs are asserting a design defect in all of the West Bend Deep Fryers of the same type. While claims asserting a manufacturing defect, as in Roselli, are specific to the individual product that allegedly caused an injury, design defect claims are distinguishable in that they allege a defect in **all** products of the same model made by the manufacturer. Thus, Defendant's reliance on Roselli is misplaced.

Next, Defendant points to the Commonwealth Court of Pennsylvania case of Schroeder v. Dept. of Transp. of the Commonwealth of Pennsylvania, 676 A.2d 727 (Pa. Commw. Ct. 1996),

appeal granted, 685 A.2d 549 (Pa., Nov. 14. 1996), in which the court stated the following:

> Whether it is alleged that a single product contained a defect or that a defect existed in an entire line of products, the inability to examine the product which is alleged to have caused the injury precludes a defendant from presenting the standard products liability causation defenses. . . . Appellees would be deprived of the opportunity to determine if the vehicle was abused, misused and whether . . . substantial alterations to the truck caused [plaintiff's] death. Accordingly, we conclude that Appellees were severely prejudiced by the destruction of Decedent's truck.

Id. at 730. However, as set forth below, the amount of prejudice that the Defendant will suffer is slight in comparison to the prejudice the plaintiff would suffer if summary judgment was granted in this case for spoliation of the evidence.

In Quaile v. Carol Cable Co., 1993 WL 53563 (E.D. Pa., Feb. 26, 1993), the court declined to grant summary judgment for the defendant even though the plaintiff had disposed of an allegedly defective lamp. Because plaintiff's theory of the case postulated that all defendant's lamps were defectively designed, the court reasoned that the defendant could examine its other lamps and, accordingly, was not prejudiced by the missing lamp.

Likewise, West Bend will not be prejudiced since West Bend will be able to examine its entire line of Four-Cup Deep Fryers. Here, Plaintiffs are correct in that Defendant could furnish expert testimony and produce test results concerning

exact duplicates of the product in question.[3] Thus, Defendant will not be severely prejudiced due to the fact that the original fryer is unavailable. Accordingly, Defendant's Motion for Summary Judgment on the basis of spoliation of the evidence will be denied.

C. Causation

Proximate cause is a necessary element in proving a tort case under a strict liability theory. Van Buskirk v. Carey Canadian Mines, Ltd., 760 F.2d 481 (3d Cir. 1985). In any products liability case, it is the plaintiff's burden to demonstrate that the injuries sustained were proximately caused by a defect in the product. Sherk v. Daisy-Heddon, 450 A.2d 615, 617 (Pa. 1982); Berkebile v. Brantly Helicopter Corp., 337 A.2d 893, 898 (Pa. 1975). A proximate, or legal cause, is defined as a substantial contributing factor in bringing about the harm in question. Van Buskirk, 760 F.2d at 492. Thus, the injuries sustained by Gerald must have been proximately caused by the alleged design defects in order for the Plaintiffs' action to survive Defendant's Motion for Summary Judgment.

The evidence and testimony concerning this accident shows that there are no direct witnesses that saw the accident take place in the kitchen. Mrs. Van Buskirk walked out of the

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3. Plaintiffs contend that every Four-Cup Deep Fryer manufactured by West Bend was furnished with a cord of the same length and will be able to provide an exact duplicate. In addition, Plaintiffs testified in their depositions that the West Bend cord was the one that was being used with the Fryer when it allegedly fell off of the microwave and burned Gerald.

kitchen and left Gerald unattended right before the accident occurred. Mr. Van Buskirk was not even home at the time the accident happened. Plaintiffs speculate that the cord must have fallen off the top of the microwave and Gerald must have grabbed the cord and pulled the fryer off of the microwave. However, Plaintiffs' theory is completely speculative and founded on inferences which this Court cannot accept. Furthermore, Mrs. Van Buskirk testified in her deposition that she carefully placed the cord on top of the microwave in a "U- shape," so that it would not hang over the side of the appliance. This testimony puts the Plaintiffs' theory that Gerald grabbed the cord even further into the realm of speculation.

In the factually similar case of Kelley v. Rival Manuf., 704 F.Supp. 1039 (W.D. Okl. 1989) the plaintiffs brought an action against the defendant company for a products liability claim asserting a defective design in defendant's product.[4] In Kelley, a young child pulled a "crock pot" off a kitchen table and was burned when the contents spilled on him. The plaintiffs were not sure how the "crock pot" fell from the table because they were not in the room at the time of the accident.

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4. Plaintiffs alleged the following four design defects in defendant's product:

> (1) the electrical cord was too long; (2) the electric cord should have been detachable; (3) the lid should have been attached or attachable in some way to prevent or control spillage of the contents if the "crock pot" was tipped over; and (4) the feet should have been constructed differently to not slide so easily. Id. at 1043.

Defendant's Motion for Summary Judgment was granted because plaintiffs were not able to produce any evidence that the alleged design defects caused the child's injuries. Id. at 1044.

Like in Kelley, Plaintiffs in the present action have submitted no evidence whatsoever tending to show that the alleged design defects were a substantial factor in bringing about the injuries to Gerald. As stated above, Plaintiffs do not know how the accident happened, making it impossible for proximate cause to be established in this products liability case. Because Plaintiffs cannot prove that the alleged design defects in the Fryer were the proximate cause of Gerald's injuries, the Defendant's Motion for Summary Judgment will be granted. Accordingly, I shall enter the following Order:

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GERALD JOSEPH VAN BUSKIRK, III, a Minor, by his Parents and Natural Guardians, GERALD J. VAN BUSKIRK, JR. and LORI ANN BUSKIRK and in Their Own Right, Plaintiffs,	CIVIL ACTION
v.	NO. 96-6945
THE WEST BEND COMPANY, Defendant.	

ORDER

AND NOW, this 10th day of July, 1997, upon consideration of Defendant's Motion for Summary Judgment, and all responses thereto, it is hereby ORDERED that Defendant's Motion is GRANTED. Judgment is entered in favor of Defendant and against Plaintiffs.

BY THE COURT:

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Robert F. Kelly, J.